

This Opinion is not a  
Precedent of the TTAB

Mailed: April 25, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board  
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*In re NKKK LLC*

Serial No. 90100250  
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Floyd Trillis III of Curatolo Sidoti Co., LPA,  
For NKKK LLC.

Tarah Hardy Ludlow, Trademark Examining Attorney, Law Office 110,  
Chris A. F. Pedersen, Managing Attorney.

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Before Kuczma, Adlin and Hudis,  
Administrative Trademark Judges.

Opinion by Kuczma, Administrative Trademark Judge:

NKKK LLC (“Applicant”) seeks registration on the Principal Register of the  
standard character mark THE COOL CAT for:

Flavored ices; Frozen confections; Shaved ice confections in  
International Class 30.<sup>1</sup>

The Trademark Examining Attorney refused registration of Applicant’s mark on  
the ground of likelihood of confusion under Section 2(d) of the Trademark Act, 15

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<sup>1</sup> Application Serial No. 90100250 was filed on August 7, 2020, based upon Applicant’s claim  
of first use anywhere and first use in commerce since at least as early as June 2017, under  
Section 1(a) of the Trademark Act, 15 U.S.C. § 1051(a).

U.S.C. § 1052(d), citing Registration No. 5988410 for the mark



for “cupcakes” in International Class 30,

owned by Cool Cat Cupcakes LLC, as a bar to registration.<sup>2</sup>

After the Trademark Examining Attorney made the refusal final, Applicant appealed to this Board. Applicant and the Examining Attorney submitted briefs, including Applicant’s Reply Brief. For the reasons set forth below, the refusal to register is affirmed.

### **I. Likelihood of Confusion**

Our determination under Trademark Act Section 2(d) is based on an analysis of all probative facts in evidence that are relevant to the factors bearing on the issue of likelihood of confusion enunciated in *In re E.I. du Pont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973), cited in *B&B Hardware, Inc. v. Hargis Indus.*,

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<sup>2</sup> The mark consists of “a stylized cartoon black cat outlined in white with a frosted cupcake in pink, brown, white, red, and green, on a retro 1950s space themed background of teal with stars and circles colored black, yellow, white, and pink; the wording ‘COOLCAT CUPCAKES NO DAIRY. NO EGGS. NO NUTS’ are written in black with white outlining, and underlining below the word ‘NO.’ A pink triangle that is outlined in white that [sic] appears behind the background of the cat.”

The colors pink, red, teal, green, brown, black, white, and yellow are claimed as a feature of the mark.

“CUPCAKES” and “NO DAIRY NO EGGS NO NUTS” are disclaimed.

*Inc.*, 575 U.S. 138, 113 USPQ2d 2045, 2049 (2015); *see also In re Majestic Distilling Co.*, 315 F.3d 1311, 65 USPQ2d 1201, 1203 (Fed. Cir. 2003).

In any likelihood of confusion analysis, two key considerations are the similarities between the marks and the similarities between the goods. *See In re i.am.symbollic, llc*, 866 F.3d 1315, 123 USPQ2d 1744, 1747 (Fed. Cir. 2017) (quoting *Herbko Int’l, Inc. v. Kappa Books, Inc.*, 308 F.3d 1156, 64 USPQ2d 1375, 1380 (Fed. Cir. 2002)); *Federated Foods, Inc. v. Fort Howard Paper Co.*, 544 F.2d 1098, 192 USPQ 24, 29 (CCPA 1976) (“The fundamental inquiry mandated by § 2(d) goes to the cumulative effect of differences in the essential characteristics of the goods and differences in the marks.”).

We have considered these factors (the marks and goods) as well as each *DuPont* factor for which there is evidence and argument. *See In re Guild Mortg. Co.*, 912 F.3d 1376, 129 USPQ2d 1160, 1162-63 (Fed. Cir. 2019). Varying weights may be assigned to each *DuPont* factor depending on the evidence presented. *See Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1800 (Fed. Cir. 2018) (not all of the *DuPont* factors are relevant to every case, only factors of significance to the particular mark need be considered); *Citigroup Inc. v. Capital City Bank Grp. Inc.*, 637 F.3d 1344, 98 USPQ2d 1253, 1261 (Fed. Cir. 2011) (“[T]he factors have differing weights.”); *In re Shell Oil Co.*, 992 F.2d 1204, 26 USPQ2d 1687, 1688 (Fed. Cir. 1993) (“[T]he various evidentiary factors may play more or less weighty roles in any particular determination.”).

**A. Similarity of the Goods**

In making our determination under the second *DuPont* factor, we look to the goods as identified in the involved application and cited registration. *Stone Lion Cap. Partners, LP v. Lion Cap. LLP*, 746 F.3d 1317, 110 USPQ2d 1157, 1161-62 (Fed. Cir. 2014).

To find a likelihood of confusion, Applicant's and Registrant's goods need not be identical or even competitive. Rather, the question is whether the goods "are related in some manner and/or if the circumstances surrounding their marketing are such that they could give rise to the mistaken belief that they emanate from the same source." *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 101 USPQ2d 1713, 1722 (Fed. Cir. 2012) (quoting *7-Eleven Inc. v. Wechsler*, 83 USPQ2d 1715, 1724 (TTAB 2007)). *See also Recot, Inc. v. Becton*, 214 F.3d 1322, 54 USPQ2d 1894, 1898 (Fed. Cir. 2000) ("even if the goods in question are different from, and thus not related to, one another in kind, the same goods can be related in the mind of the consuming public as to the origin of the goods"); *In re Wilson*, 57 USPQ2d 1863, 1866-67 (TTAB 2001). Thus, the issue is not likelihood of confusion between particular goods, but likelihood of confusion as to the source or sponsorship of those goods. *In re Majestic Distilling*, 65 USPQ2d at 1205; *In re Shell Oil*, 26 USPQ2d at 1689; *In re Aquitaine Wine USA, LLC*, 126 USPQ2d 1181, 2018 (TTAB 2018).

Applicant's goods are:

flavored ices; frozen confections; shaved ice confections in  
International Class 30,

and Registrant's goods are:

cupcakes in International Class 30.

The Examining Attorney contends there is a likelihood of confusion because the goods of Applicant and Registrant may be offered by the same entity and provided under the same trademark. In support, the Examining Attorney submits 21 third-party registrations, owned by 19 different entities, covering both goods such as those identified in the involved application and cited Registration:<sup>3</sup>

Mark	Registration No.	Goods in Class 30
DBAKERS SWEET STUDIO “sweet studio” disclaimed	5758488	... Bakery products, namely, sweet bakery goods; Cakes; ... ; Cookies; ... ; Croissants; Cupcakes; ... ; Pastries; Pies; Bakery desserts; Chocolate confections; Frozen confections
CANDY WITH A TWIST “candy” disclaimed	5803616	... Bakery goods and dessert items, namely, cakes, cookies, pastries, candies, and frozen confections for retail and wholesale distribution and consumption on or off the premises; ...
LEOPARD & PEAR “pear” disclaimed	5878378	... Bakery goods and dessert items, namely, cakes, cookies, pastries, candies, and frozen confections for retail and wholesale distribution

<sup>3</sup> See November 4, 2020 Office Action at TSDR 9-37; May 5, 2021 Final Office Action at TSDR 6-41.

Citations to the application record are to the online database of the USPTO’s Trademark Status & Document Retrieval (TSDR) system by page number in the downloadable .pdf format. Citations to the record and the briefs refer to the Board’s TTABVUE docket system. Before the TTABVUE designation is the docket entry number; and after this designation are the page references, if applicable.

		<p>and consumption on or off the premises; ...                  Gluten-free desserts, namely, ..., cheesecakes, Cookies, ... , cupcakes, donuts, pies; Ice cream desserts;...</p>
 <p>“sugar” and “coffee &amp; dessert parlour” are disclaimed</p>	<p>6065641</p>	<p>... Ice-cream cakes; Ice cream; Ice cream bars; Ice cream floats; Ice cream sandwiches; Ice cream cakes; Ice cream substitute; Ice cream sundaes; Ices and ice creams; ... cakes, cupcakes, cookies, pastries, ... and frozen confections for retail and wholesale distribution and consumption on or off the premises; ...                  Flavored, Frozen dessert consisting of fruit and cream or cream substitutes; Frozen confectionery containing ice cream; Ice cream desserts; ...</p>
 <p>“treats” is disclaimed</p>	<p>5992726</p>	<p>... Cookie dough; Cookies; Cup cakes; Cupcakes that contain alcohol; Bakery goods and dessert items, namely, cakes, cookies, ... and frozen confections for retail and wholesale distribution and consumption on or off the premises; ... Frozen cookie dough; Frozen cookies batter; Fruit cakes; Snack cakes; Vegan cup cakes</p>

	<p>6154628</p>	<p>... Ice cream; soft-serve ice cream; bakery goods and dessert items, namely, cakes, cookies, ... and frozen confections for retail and wholesale distribution and consumption on or off the premises; ... Japanese traditional sweets, namely, wagashi; toast; cakes; cupcakes; matcha cake; ... ; kits comprised of ingredients for making ice cream</p>
<p>CAKERY SQUARE</p>	<p>6027329</p>	<p>Bakery goods and dessert items, namely, cakes, cookies, cupcakes, ... and frozen confections for retail and wholesale distribution and consumption on or off the premises</p>
	<p>6167173<sup>4</sup></p>	<p>... Bakery goods and dessert items, namely, cakes, cookies, ... and frozen confections for retail and wholesale distribution and consumption on or off the premises; Bakery goods, namely, bakery desserts, cookies, cupcakes; ... Gluten-free desserts, namely, bakery desserts, cookies, cupcakes; ... ; Chocolate covered cookies; Vegan cookies</p>
<p>SIMPLY FLOURLESS</p>	<p>6028875</p>	<p>... Gluten-free desserts, namely, cakes, cupcakes,</p>

<sup>4</sup> The owner of this Registration also owns Registration No. 6018842 for a design mark for the same goods.

<p>“flourless” disclaimed</p>		<p>cookies, ... Bakery desserts; Bakery goods and dessert items, namely, cakes, cookies, ... and frozen confections for retail and wholesale distribution and consumption on or off the premises; ...</p>
 <p>“tea” disclaimed</p>	<p>5444019</p>	<p>... Chocolate cakes; Chocolate candies; ... Cookies with nuts; ... Cup cakes; Cupcakes that contain alcohol; ... Edible cupcake liners that bake onto the cupcake itself; ... Flavored ices; ...</p>
 <p>“maison fondée à pont-aven en 1920” is disclaimed</p>	<p>5854860</p>	<p>... cakes, cupcakes, pastries; ... Cookies; ... Cakes; ... flavored ices; Sherbets; ...</p>
<p>NUMAADE</p>	<p>6223576<sup>5</sup></p>	<p>... Cake pops; Cakes; Cupcakes that contain alcohol; ... Bakery goods and dessert items, namely, cakes, cookies, ... and frozen confections for retail and wholesale distribution and consumption on or off the premises; ... Blueberry pies; ...</p>

<sup>5</sup> The owner of this Registration also owns Registration No. 6223577 for a stylized version of this mark for nearly identical goods.

		Chocolate cakes; ... Cookie pies; Cup cakes; ... Frozen yogurt pies and cakes; ... Ice-cream cakes; Iced cakes; ... Vegan pies; Vegan cup cakes
	6226116	... Bakery goods and dessert items, namely, cakes, cookies, ... and frozen confections for retail and wholesale distribution and consumption on or off the premises; ... Cakes; ... Cookies; Cookies with nuts; ... Cupcakes; ... Frozen confectionery; Frozen confectionery containing ice cream; Frozen confections; ... Ice cream; Ice cream bars; Ice cream desserts; ... Vegan cakes; ... Vegan cookies; Vegan cup cakes; Vegan frozen confections; . . . Vegan ice cream; ...
DEANNA'S DELIGHTS	6210808	Bakery goods, namely, cookies, brownies, ... cupcakes; . . . Bakery goods and dessert items, namely, cakes, cookies, ... and frozen confections for retail and wholesale distribution and consumption on or off the premises; Vegan cakes; Vegan cookies; Vegan cup cakes; Vegan ice cream
NOBLE BITES	6298435	... Cookies; Cookies with nuts; Cupcakes; Cupcakes that contain

<p>“bites” disclaimed</p>		<p>alcohol; ... Bakery goods and dessert items, namely, cakes, cookies, ... and frozen confections for retail and wholesale distribution and consumption on or off the premises; ... Chocolate cakes; Cup cakes; ... Edible cake decorations; ... Vegan cookies</p>
 <p>“pastry” disclaimed</p>	<p>6250227</p>	<p>... Cakes; ... Cookies; Cupcakes; ... Bakery goods and dessert items, namely, cakes, cookies, ... and frozen confections for retail and wholesale distribution and consumption on or off the premises; ... Frozen confections; ... Non-dairy frozen confections; ...</p>
<p>HOUSE OF BRIGADEIROS</p> <p>“brigadeiros” disclaimed</p>	<p>6332472</p>	<p>... Cup cakes; Cupcakes; ... Frozen confections; ... Ice-cream; ... Pumpkin pies; ... Vegan cakes; Vegan frozen confections; ... Vegan ice cream; Vegan cup cakes</p>
<p>KEEDA’S KAKES AND MATES</p> <p>“cakes” disclaimed</p>	<p>6313116</p>	<p>Cakes; ... Cookies with nuts; Cupcakes; ... Bakery goods and dessert items, namely, cakes, cookies, ... and frozen confections for retail and wholesale distribution and consumption on or off the premises; ...</p>
<p>CAROLINA TUCKERY</p> <p>“Carolina” disclaimed</p>	<p>6313926</p>	<p>Cakes; Cookies; Cupcakes; ... Cup cakes; ... Bakery goods and</p>

		dessert items, namely, cakes, cookies, ... and frozen confections for retail and wholesale distribution and consumption on or off the premises; ... Edible cupcake liners that bake onto the cupcake itself; ... Ice-cream cakes; ... Vegan cakes; Vegan cup cakes; ...
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Although these third-party registrations are not evidence that the marks shown therein are in use on a commercial scale or that the public is familiar with them, they nonetheless have probative value to the extent they serve to suggest that the identified goods are of a kind which are produced or marketed by a single source under a single mark. *See In re Aquamar, Inc.*, 115 USPQ2d 1122, 1126 n.5 (TTAB 2015) (citing *In re Mucky Duck Mustard Co.*, 6 USPQ2d 1467, 1470 n.6 (TTAB 1988)); *In re Davey Prods. Pty. Ltd.*, 92 USPQ2d 1198, 1203 (TTAB 2009). Here, the third-party trademarks are registered for use in connection with the same or similar goods as those of both Applicant and Registrant, i.e., cupcakes, and flavored ices and frozen confections. Accordingly, these third-party use-based registrations are evidence that those goods are of a kind that may emanate from a single source under a single mark, and thus are related for the purpose of determining likelihood of confusion.

In addition, the Examining Attorney submits screen captures of websites showing retailers advertising both their cupcakes and frozen confections under their house

brand, further supporting the relatedness of Applicant's and Registrant's goods (*see* May 5, 2021 Final Office Action):

SmallCakes Cupcakery and Creamery (advertising stores in several states): offers its baked cupcakes and its daily made small-batch ice cream at <https://www.smallcakescupcakery.com/> at TSDR 44-45, 51-60;

Argyle, Richmond, VA: offers its "tasty" cupcakes ("we bake our cupcakes with yogurt") and frozen yogurt, as well as cookies and scones at <http://www.loveargyle.com/> at TSDR 46-47;

Cupcake Charlie's (advertising multiple "Locations"), offers cupcakes, ice cream, and other sweets including gluten free and vegan at <http://www.cupcakecharlies.com/icecreammenu.html> at TSDR 48-49;

Sweet Daddy Cupcakes and Ice Cream (Arizona): offering "freshly baked" cupcakes "baked fresh in small batches," ice cream sandwiches and ice cream milkshakes at <https://www.sweetdaddycupcakes.com> at TSDR 61-65;

Cupcake Royale Bakeshop Ice Creamery Espresso (Seattle area): offers cupcakes, espresso and ice cream at <https://www.cupcakeroyale.com/> at TSDR 66-68.

This website evidence showing the same entities offering their house brand frozen and shaved ice confections, and cupcakes, further supports the relatedness of Applicant's and Registrant's goods. *See, e.g., In re C.H. Hanson Co.*, 116 USPQ2d 1351, 1355-56 (TTAB 2015); *In re Davey Prods.*, 92 USPQ2d at 1203; *In re Toshiba Med. Sys. Corp.*, 91 USPQ2d 1266, 1271-72 (TTAB 2009).

Applicant's reliance on the non-precedential Board decision in *In re Tonche*, Serial No. 77730883 (8 TTABVUE), [Bloomberglaw.com](http://Bloomberglaw.com) (TTAB June 24, 2011), to support its argument that nothing in the record indicates "consumers of registrant's **particular type** of cupcakes (i.e., cupcakes that are dairy-free, egg-free and nut-free)

would believe that registrant also offers other foods which may include dairy and/or nuts (such as the goods identified in the present application),”<sup>6</sup> is misplaced. (emphasis in original).

While *In re Tonche* may be cited and considered for whatever persuasive value it may have, it is not binding on the Board. Because non-precedential cases have no precedential effect, the Board generally does not discuss them in other decisions. See *In re tapio GmbH*, 2020 USPQ2d 1138, at \*10 n.30 (TTAB 2020) (“Generally, the practice of citing non-precedential opinions is not encouraged.” Board found unpersuasive non-precedential decisions decided on different records); *In re the Procter & Gamble Co.*, 105 USPQ2d 1119, 1120-21 (TTAB 2012) (citation to non-precedential opinions permitted but not encouraged; non-precedential decisions not binding on the Board); see also TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE (TBMP) § 101.03 and 1203.02(f) (2021).

More importantly, the facts in this case are very different from those in *In re Tonche* where the applicant’s goods were “clothing, namely, T-shirts, sweatshirts, shirts, hats, pants, shorts, jackets, and caps,” while the goods in the cited registration were “footwear incorporating a light feature.” *In re Tonche*, Bloomberglaw.com at \*1-2. In reaching the decision to reverse the refusal of registration, the Board noted the “specialized nature of the goods identified in the cited registration.” *Id.* at \* 12. Unlike the specialized registered goods identified in *Tonche*, here, Registrant’s goods are

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<sup>6</sup> Applicant’s Appeal Brief p. 4 (4 TTABVUE 5) citing *In re Tonche*, Bloomberglaw.com at \*4-5.

identified in its registration as simply “cupcakes,” rather than “cupcakes that are diary-free, egg-free and nut-free” as Applicant argues.<sup>7</sup> Thus, the *Tonche* case, even if it were a precedential case, is not relevant. *See Stone Lion v. Lion*, 110 USPQ2d at 1163 (“Granting Stone Lion’s application would entitle it to the full scope of services recited therein ....”).

Based on the evidence of third-party use and third-party registrations, we find the goods identified in Applicant’s application are related to the goods identified in the cited Registration. Accordingly, the similarity of the goods factor favors a finding of likelihood of confusion.

### **B. Similarity of the Trade Channels and Classes of Customers**

Turning to the similarity of the trade channels and classes of customers under the third *DuPont* factor, 177 USPQ at 567, because neither Applicant’s nor Registrant’s identification of goods includes any restrictions or limitations as to trade channels, we presume that the respective goods are or would be marketed in all normal trade channels for such goods. *See In re I-Coat Co.*, 126 USPQ2d 1730, 1737 (TTAB 2018); *In re Davey Prods.*, 92 USPQ2d at 1203; *In re Elbaum*, 211 USPQ 639 (TTAB 1981). The third-party websites made of record that advertise both cupcakes and frozen confections,<sup>8</sup> establish that the goods are offered through the same trade channels to the same classes of customers.

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<sup>7</sup> *See* Applicant’s Appeal Brief p. 4 (4 TTABVUE 5).

<sup>8</sup> *See* May 5, 2021 Final Office Action at TSDR 44-68.

Applicant argues “that there is nothing in the record that would indicate that consumers of registrant’s **particular type** of cupcakes (i.e., cupcakes that are dairy-free, egg-free and nut-free) would believe that registrant also offers frozen confections which may include dairy and/or nuts.” (emphasis original).<sup>9</sup> This argument is not convincing as it overlooks that Applicant’s flavored ices and shaved ice confections are not known to contain dairy or nuts.<sup>10</sup> The argument also is belied by the website evidence, and is irrelevant because Registrant’s identification is not limited to dairy-, egg- or nut-free goods. *Stone Lion v. Lion*, 110 USPQ2d at 1162 (“An application with ‘no restriction on trade channels’ cannot be ‘narrowed by testimony that the applicant’s use is, in fact, restricted to a particular class of purchasers.’”).

Accordingly, we find the trade channels through which Applicant’s and Registrant’s goods travel, and the customers to whom they are offered, favors a finding of likelihood of confusion.

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<sup>9</sup> Applicant’s Reply Brief p. 2 (7 TTABVUE 3).

<sup>10</sup> The definition of “shaved ice” is “2. Originally and chiefly U.S. A frozen dessert or refreshment made with finely-shaved or crushed ice and flavoured syrup or other sweet ingredients, typically served in a paper cone or cup; a portion or serving of this.” Oxford English Dictionary at [oed.com/view/Entry/85120651?redirectedFrom=shaved+ice#eid](http://oed.com/view/Entry/85120651?redirectedFrom=shaved+ice#eid). Accessed April 25, 2022.

The Board may take judicial notice of dictionary definitions, including online dictionaries that exist in printed format or have regular fixed editions. *In re Cordua Rests. LP*, 110 USPQ2d 1227, 1229 n.4 (TTAB 2014), *aff’d*, 823 F.3d 594, 118 USPQ2d 1632 (Fed. Cir. 2016).

**C. Conditions Under Which and Buyers to Whom Sales are Made, i.e., “Impulse” Versus Careful, Sophisticated Purchasing**

The fourth *DuPont* factor concerns the conditions under which and buyers to whom sales are made, i.e. “impulse” versus careful, sophisticated purchasing. *DuPont*, 177 USPQ at 567.

Applicant argues “Registrant’s unique goods would not be marketed to ordinary cupcake purchasers, but rather to discerning allergy-aware consumers who purchase their food after careful consideration of the ingredients in order to avoid potentially life-threatening allergic reactions.”<sup>11</sup> Applicant contends that in this case, “the least sophisticated potential purchaser of registrant’s specialized cupcakes would likely be a discerning allergy-aware individual who pays close attention when making purchasing decisions regarding their food,”<sup>12</sup> “making confusion even less likely.”<sup>13</sup>

Applicant ignores the identification of goods found in Registrant’s Registration which are cupcakes with no restrictions. Moreover, we cannot read limitations or restrictions into Registrant’s identification of goods. *In re i.am.symbolic*, 123 USPQ2d at 1748 (“It is well established that the Board may not read limitations into an unrestricted registration or application.”); *Squirtco v. Tomy Corp.*, 697 F.2d 1038, 216 USPQ 937, 940 (Fed. Cir. 1983) (“There is no specific limitation here, ... The board, thus, improperly read limitations into the registration”); *In re Thor Tech, Inc.*, 90

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<sup>11</sup> Applicant’s Appeal Brief p. 4 (4 TTABVUE 5); Applicant’s Reply Brief p. 3 (7 TTABVUE 4).

<sup>12</sup> Applicant’s Appeal Brief p. 5 (4 TTABVUE 6).

<sup>13</sup> Applicant’s Appeal Brief p. 4 (4 TTABVUE 5).

USPQ2d 1634, 1638 (TTAB 2009) (“We have no authority to read any restrictions or limitations into the registrant’s description of goods.”).

There is no evidence supporting the sophistication or care required of the customers of Registrant’s cupcakes or Applicant’s flavored ices, frozen confections and shaved ice confections. Applicant’s and Registrant’s goods are ordinary consumer goods that are usually inexpensive and purchased casually and on impulse. Customers of such relatively low-cost items exercise a lesser standard of purchasing care and, thus, are more likely to be confused as to the source of the goods. *See Recot v. Becton*, 54 USPQ2d at 1899 (“When products are relatively low-priced and subject to impulse buying, the risk of likelihood of confusion is increased because purchasers of such products are held to a lesser standard of purchasing care.”); *Specialty Brands, Inc. v. Coffee Bean Distribs., Inc.*, 748 F.2d 669, 223 USPQ 1281, 1282 (Fed. Cir. 1984) (when both products are relatively inexpensive, comestible goods subject to frequent replacement, purchasers of such products have been held to a lesser standard of purchasing care); *In re Martin’s Famous Pastry Shoppe, Inc.*, 748 F.2d 1565, 223 USPQ 1289, 1290 (Fed. Cir. 1984) (bread and cheese are staple, relatively inexpensive comestibles, subject to frequent replacement; holding purchasers to a lesser standard of purchasing care).

This factor weighs in favor of finding that there is a likelihood of confusion.

#### **D. Similarity of the Marks**

Marks are compared in their entirety for similarities in appearance, sound, connotation and commercial impression. *Stone Lion v. Lion*, 110 USPQ2d at 1160

(quoting *Palm Bay Imps., Inc. v. Veuve Clicquot Ponsardin Maison Fondée En 1772*, 396 F. 3d 1369, 73 USPQ2d 1689, 1691 (Fed. Cir. 2005)); *In re Viterra*, 101 USPQ2d at 1908. “Similarity in any one of these elements may be sufficient to find the marks confusingly similar.” *Chutter, Inc. v. Great Management Group, LLC*, 2021 USPQ2d 1001, at \*35 (TTAB 2021) (citing *In re Inn at St. John’s, LLC*, 126 USPQ2d 1742, 1746 (TTAB 2018), *aff’d per curiam*, 777 F. App’x 516 (Fed. Cir. 2019)).

Because the similarity or dissimilarity of the marks is determined by considering the marks in their entirety, our analysis cannot be predicated on dissecting the marks into their various components; that is, the decision must be based on the entire marks, not just part of the marks. *In re Nat’l Data Corp.*, 753 F.2d 1056, 224 USPQ 749, 751 (Fed. Cir. 1985); *see also Franklin Mint Corp. v. Master Mfg. Co.*, 667 F.2d 1005, 212 USPQ 233, 234 (CCPA 1981) (“It is axiomatic that a mark should not be dissected and considered piecemeal; rather, it must be considered as a whole in determining likelihood of confusion.”). While we must consider the marks in their entirety, it is appropriate to accord greater importance to the more distinctive elements in the marks in determining whether the marks are similar. *In re Nat’l Data*, 224 USPQ at 751 (“[T]here is nothing improper in stating that, for rational reasons, more or less weight has been given to a particular feature of a mark, provided the ultimate conclusion rests on consideration of the marks in their entirety.”).

Applicant’s mark is THE COOL CAT, where “COOL CAT” is arbitrary and forms the distinguishing part of the mark. The word “THE” in Applicant’s mark is a definite article merely serving to specify or particularize the term it precedes. Because it has

little, to no, source-identifying significance, “THE” generally does not affect the likelihood of confusion analysis. *See In re Thor Tech*, 90 USPQ2d at 1635 (the word “the” in THE WAVE merely emphasizes the word “wave”); *In re Narwood Prods., Inc.*, 223 USPQ 1034, 1035 n.2 (TTAB 1984) (noting the insignificance of the word “the” in comparison of THE MUSIC MAKERS and MUSICMAKERS); *Conde Nast Publ’ns Inc. v. Redbook Publ’g Co.*, 217 USPQ 356, 357 (TTAB 1983) (“the” cannot serve as an indication of origin even if applicant’s magazine was the only magazine for young women).

Customers are generally more inclined to focus on the first word, portion, or syllable in any trademark. Here, the distinctive term “COOL CAT,” is the dominant portion of Registrant’s mark, placed prominently as the first literal term in the registered mark, where it will be noticed and recognized by customers. Adding to or deleting a minor feature without source identifying significance such as “the” from the dominant portion of a registered mark generally does not obviate the similarity between the marks. *See In re Chatam*, 380 F.3d 1340, 71 USPQ2d 1944, 1946-47 (Fed. Cir. 2004). Likelihood of confusion has frequently been found where the entirety of one mark is incorporated within another and particularly when the two marks begin with the same wording, as is the case here. *See In re Detroit Athletic Co.*, 903 F.3d 1297, 128 USPQ2d 1047, 1049 (Fed. Cir. 2018) (finding “[t]he identity of the marks’ two initial words is particularly significant because consumers typically notice those words first”); *Palm Bay v. Veuve Clicquot*, 73 USPQ2d at 1692 (finding similarity between VEUVE ROYALE and two VEUVE CLICQUOT marks in part because

“VEUVE . . . remains a ‘prominent feature’ as the first word in the mark and the first word to appear on the label” and “it is often the first part of mark which is most likely to be impressed upon the mind of a purchaser and remembered” when making purchasing decisions); *see also L’Oreal S.A. v. Marcon*, 102 USPQ2d 1434, 1439 (TTAB 2012) (citing *Presto Prods., Inc. v. Nice-Pak Prods., Inc.*, 9 USPQ2d 1895, 1897 (TTAB 1988) (“it is often the first part of a mark which is most likely to be impressed upon the mind of a purchaser and remembered” when making purchasing decisions)).

The verbal portion of Applicant’s mark is similar in sound and appearance to Registrant’s mark as both marks essentially start off with the same distinctive first



term, “COOL CAT.” Looking at Registrant’s mark, i.e., “COOL CAT” is placed prominently as the first literal term, is arbitrary and is the only part of the mark presented in large script font. Thus, it is the most significant literal element and is a distinguishing part of its mark.

This is especially so where the first portion of Registrant’s mark is followed by generic and highly descriptive terms which have been disclaimed, i.e., “CUPCAKES” a generic term meaning “a small cake baked in a cuplike mold,”<sup>14</sup> and “NO DAIRY. NO EGGS. NO NUTS,” which is at best merely descriptive of Registrant’s cupcakes, advising the reader that the cupcakes were not made with any of those products.

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<sup>14</sup> We take judicial notice of the definition of “cupcake” from Merriam-Webster.com Dictionary, <https://www.merriam-webster.com/dictionary/cupcake>. © Merriam-Webster, Incorporated. Accessed April 25, 2022.

Disclaimed, descriptive or generic matter is typically less significant or less dominant in relation to other wording in a mark. *See In re Detroit Athletic*, 128 USPQ2d at 1050 (citing *In re Dixie Rests., Inc.*, 105 F.3d 1405, 41 USPQ2d 1531, 1533-34 (finding “delta” the dominant part of the mark “THE DELTA CAFÉ because CAFÉ was disclaimed)); *In re Chatam*, 71 USPQ2d at 1946 (“Because ALE has nominal commercial significance, the Board properly accorded the term less weight in assessing the similarity of the marks [JOSE GASPARGOLD and GASPARGOLD’S ALE] under *DuPont*.”); *In re Nat’l Data*, 224 USPQ at 751 (“[t]hat a particular feature is descriptive or generic with respect to the involved goods or services is one commonly accepted rationale for giving less weight to a portion of a mark”). Thus, the descriptive terms in Registrant’s mark are less significant in affecting its overall commercial impression and result in the leading term “COOL CAT” being the dominant literal portion of Applicant’s and Registrant’s marks. *In re Detroit Athletic*, 128 USPQ2d at 1049-50 (additional descriptive wording “do[es] little to alleviate the confusion that is likely to ensue”).

Applicant contends the wording “NO DAIRY. NO EGGS. NO NUTS” in Registrant’s mark limits the connotation of that mark to cupcakes that are dairy-free, egg-free and nut-free, whereas Applicant’s mark has no such connotation making it unlikely that customers would believe Registrant has expanded into other foods, such as Applicant’s goods, which include dairy and/or nuts.<sup>15</sup> Additionally, Applicant

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<sup>15</sup> Applicant’s Appeal Brief p. 2 (4 TTABVue 3), Applicant’s Reply Brief pp. 1-2 (7 TTABVue 2-3).

argues that the underlined letter “O” in the three appearances of the word “NO” in Registrant’s mark, displayed in capital letters, “would immediately draw one’s attention.”<sup>16</sup> “Moreover, consumers would likely remember and use ‘NO DAIRY. NO EGGS. NO NUTS’ to refer to registrant and its unique cupcakes,”<sup>17</sup> which Applicant asserts results in different connotations and commercial impressions.

Inasmuch as the wording “NO DAIRY. NO EGGS. NO NUTS” in Registrant’s mark is located in the last line of text and presented in noticeably smaller font than any of the other wording used in the mark, it is unlikely that it would immediately draw customer attention. Assuming *arguendo* that the wording “NO DAIRY. NO EGGS. NO NUTS” in Registrant’s mark limits the connotation of Registrant’s mark to cupcakes that are dairy-free, egg-free and nut-free, given the other similarities between the marks, this is not enough to avoid a likelihood of confusion.

In support of its argument that it is unlikely a mark that includes “the prominent and limiting wording ‘NO DAIRY. NO EGGS. NO NUTS’” would be used in connection with its flavored ices, frozen confections or shaved ice confections which may include dairy and/or nuts, Applicant cites *In re Spinal USA*, Serial No. 85386695 (12 TTABVUE), Bloomberglaw.com at \*3-4 (TTAB July 2, 2013), another non-precedential Board decision.<sup>18</sup> *In re Spinal USA* involved an application for the mark ALLAY in standard characters for “spinal column braces for medical purposes,

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<sup>16</sup> *Id.*

<sup>17</sup> Applicant’s Appeal Brief p. 3 (4 TTABVUE 4).

<sup>18</sup> Applicant’s Appeal Brief p. 3 (4 TTABVUE 4).

namely back braces and cervical neck braces” which was refused registration under



§ 2(d) of the Trademark Act in view of the registered mark for

“high frequency electromagnetic therapy apparatus.” While the Board noted it must

base the evaluation of the goods as identified in the registration and application, it

also stated:

. . . The question remains, however, what is the scope of protection to be accorded [the registered] mark, despite the broad wording in the goods section of the registration, when the mark itself contains prominent and limiting wording. In other words, do we protect this particular mark that includes the wording MENSTRUAL PAIN THERAPY against an application for products which are **unrelated** to menstrual pain therapy? . . .

*Id.* at \*4 (emphasis added). The Board found that “the additional matter in registrant’s mark creates a different commercial impression such that confusion is not likely, in particular when considered in connection with the parties’ respective goods.” *Id.* at \*5. As specifically noted by the Board, “there is nothing in the record to support a finding that devices for treating menstrual pain emanate from the same source as spinal column braces for medical purposes.” *Id.* at \*3. Aside from *In re Spinal USA* being a non-precedential decision which is not binding on the Board,<sup>19</sup> it is factually different from the present case where the evidence makes clear that

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<sup>19</sup> See p. 13 *supra* regarding discussion about non-precedential cases having no precedential effect and therefore, are not binding on the Board.

Applicant's goods emanate from the same sources as Registrant's goods, under the same marks or trade names.

Although there is some difference in the overall sound and appearance of the marks stemming from the descriptive wording "CUPCAKES" and "NO DAIRY. NO EGGS. NO NUTS" in Registrant's mark, that does not significantly differentiate the meaning of the marks for related food products. When Applicant's and Registrant's marks are considered in their entirety, the descriptive terms "CUPCAKE" and "NO DAIRY. NO EGGS. NO NUTS" do little to distinguish Applicant's mark from Registrant's mark which both begin with the dominant term "COOL CAT."

Registrant's mark also features a multi-colored design, consisting of a stylized black cat with a cupcake perched on its raised tail, sitting in a pink triangle on an aqua background decorated with circle designs and sparkle embellishments. The stylized black cat is positioned alongside the term "COOL CAT" reinforcing customers' attention to the most distinctive literal portion of Registrant's mark, i.e., "COOL CAT," which is virtually identical to Applicant's mark. Because customers will use the distinctive wording "COOL CAT," which is placed prominently as the first term in the mark, to both identify and call for Registrant's cupcakes, the design elements of Registrant's mark are entitled to less weight in our analysis. *Jack Wolfskin Ausrüstung Fur Draussen GmbH & Co. KGAA v. New Millennium Sports, S.L.U.*, 797 F.3d 1363, 116 USPQ2d 1129, 1134 (Fed. Cir. 2015) ("the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed") citing *CBS Inc. v. Morrow*, 708 F.2d 1579, 218 USPQ 198, 200 (Fed. Cir.

1983); *In re Viterra*, 101 USPQ2d at 1908, 1911 (“In the case of a composite mark containing both words and a design, the verbal portion of the mark is the one most likely to indicate the origin of the goods to which it is affixed” (internal quotation marks omitted)); *In re Dakin’s Miniatures Inc.*, 59 USPQ2d 1593, 1596 (TTAB 1999) (“In the case of marks which consist of words and a design, the words are normally accorded greater weight because they would be used by purchasers to request the goods”). Thus, the commercial impression engendered by Registrant’s mark is that it is the “COOL CAT” brand of cupcakes.

Applicant acknowledges that “[w]hen a mark comprises both words and a design, the words are normally accorded greater weight” citing, *e.g.*, *In re Viterra*, 101 USPQ2d at 1905, but it goes on to point out “[t]his is not to say that the Board cannot, in appropriate circumstances, give greater weight to a design component of a composite mark,” citing *Jack Wolfskin v. New Millennium Sports*, 116 USPQ2d at 1135. Applicant argues there are “stark differences” in appearance created by the design elements in Registrant’s mark, including “the unusual design of a stylized feline on a retro 1950s space themed background” (and “the wording ‘NO DAIRY. NO EGGS. NO NUTS’”) which “immediately draw one’s attention and engage[s] the viewer.”<sup>20</sup>

Applicant asserts that “the prominent image of a feline (i.e., a female cat) in the cited mark changes the meaning of ‘cool cat’ in that mark which typically refers to

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<sup>20</sup> Applicant’s Appeal Brief p. 3 (4 TTABVUE 4).

‘someone, usually a man, who is regarded as hip and cool.’”<sup>21</sup> We take judicial notice of another dictionary definition defining “cool cat” as “a fashionable person.”<sup>22</sup> Considering both of these definitions and the use of “COOL CAT” in Applicant’s and Registrant’s marks, we do not find that the term “cool cat” necessarily refers to a man. Moreover, the stylized cat design in Registrant’s mark directs customer’s attention to the most distinctive literal portion of Registrant’s mark, “COOL CAT,” reaffirming the significance of “COOL CAT” found in both marks.

When evaluating the similarities of marks, if one of the marks comprises both a



word and a design, such as Registrant’s mark, the word portion is normally accorded greater weight in determining whether the marks are similar because it would be more likely to be impressed upon a customer’s memory and used by customers to request the goods. *CBS Inc. v. Morrow*, 218 USPQ at 200; *In re Kysela Pere et Fils Ltd.*, 98 USPQ2d 1261, 1267-68 (TTAB 2011).

While the marks may be distinguishable in a side-by-side comparison, that is not the test for purposes of the likelihood of confusion analysis. Rather, it is “whether the

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<sup>21</sup> Applicant’s Appeal Brief p. 3 and Exhibit A (4 TTABVUE 4, 7) citing to a listing for “cool cat” in THE FREE DICTIONARY BY FARLEX from the Farlex Dictionary of Idioms, [idioms.thefreedictionary.com/cool+cat](http://idioms.thefreedictionary.com/cool+cat).

We grant Applicant’s request and take judicial notice of the meaning of “cool cat” attached as Exhibit A to Applicant’s Appeal Brief.

<sup>22</sup> We take judicial notice of the definition of “cool cat” from the Cambridge Advanced Learner’s Dictionary & Thesaurus © Cambridge University Press, Cambridge Dictionary, [Dictionary.cambridge.org/us/dictionary/English/cool-cat](http://Dictionary.cambridge.org/us/dictionary/English/cool-cat). Accessed April 25, 2022.

marks are sufficiently similar in terms of their commercial impression such that persons who encounter the marks would be likely to assume a connection between the parties.” *Cai v. Diamond Hong*, 127 USPQ2d at 1801 and *In re Bay State Brewing Co.*, 117 USPQ2d 1958, 1960 (TTAB 2016 (each quoting *Coach Servs. v. Triumph Learning*, 101 USPQ2d at 1721)).

Thus, potential customers may very well believe that Applicant’s mark is a version of Registrant’s mark, or that it represents an extension of Registrant’s goods, or vice versa. “Even those purchasers who are fully aware of the specific differences between the marks may well believe, because of the similarities between them, that the two marks are simply variants of one another, used by a single producer to identify and distinguish companion lines of products.” *In re Great Lakes Canning, Inc.*, 227 USPQ 483, 485 (TTAB 1985).

## II. Conclusion

Based on the evidence presented, Applicant’s mark THE COOL CAT and



Registrant’s mark are similar in appearance, sound, connotation, and commercial impression such that the inclusion of the design elements and descriptive terms in Registrant’s mark do not differentiate the marks enough to avoid the likelihood of confusion between them. The goods of Applicant and Registrant are commercially related, travel in the same trade channels to some of the same classes of customers and thus are likely to be encountered together in the

marketplace. The lower standard of customer sophistication or care that may be taken in making purchasing decisions for Applicant's and Registrant's types of goods also contributes to likely confusion. Therefore, considering the relevant *DuPont* factors, potential customers are likely to be confused and mistakenly believe that the goods originate from a common source.

**Decision:** The refusal to register Applicant's mark THE COOL CAT under § 2(d) of the Trademark Act is affirmed.